

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENTS ON BEHALF OF STUDENT,

v.

CUPERTINO UNION SCHOOL DISTRICT.

OAH CASE NUMBER 2021060041

ORDER DENYING MOTION TO QUASH SUBPOENAS AND
MODIFYING DATE AND TIME FOR WITNESS'
APPEARANCE AND TESTIMONY

OCTOBER 4, 2021

On May 28, 2021, Student filed a request for due process naming Cupertino Union School District. On July 12, 2021, an order granting a continuance in this matter was issued and scheduled the case for hearing on October 5 through 7, 2021.

On September 21, 2021, Cupertino Union School District issued subpoenas duces tecum on multiple witnesses. Cupertino Union School District served Student with a notice to consumer and with copies of the subpoenas. The subpoenas to Rebecca Fineman, Amy Travers, Vibha Pathak, Maayan Glaser-Koren, and Karen Swinehart sought

records related to their evaluations and reports of Student, and communications with Parents, asking they be provided for the due process hearing.

On September 21, 2021, Student filed a motion to quash the subpoenas on the grounds that they were irrelevant, overbroad and vague, and there was no reasonable necessity. On September 24, 2021, Cupertino Union School District opposed the motion arguing the subpoenas were relevant, were sufficient to put witnesses on notice of the records sought, were not vague or overbroad, and were reasonably necessary.

Student claims those subpoenas are irrelevant because those witnesses were previously identified on Student's witness list, and the corresponding reports were previously identified on Student's exhibit list. Student alleges the documents requested are overbroad and vague because the witnesses could not understand what "communication between the witness and the Parents" would mean. Student claims there was no reasonable necessity for the documents, and the actions were intended to harass the witnesses.

The subpoenaed documents requested of Rebecca Fineman and Amy Travers were identical and included communications with Student's Parents, and any and all records pertaining to the Independent Educational Evaluation they conducted of Student and reported to the IEP team on November 17, 2019, asserting the records were necessary as they related to Student's 2019 and 2020 assessments.

The subpoenaed documents requested of Vibha Pathak included communications with Student's Parents and any and all records pertaining to the Independent Educational Evaluation conducted of Student with a report date of August 25, 2020, asserting the records were necessary as they related Student's 2019 and 2020 assessments.

The subpoenaed documents requested of Maayan Glaser-Koren, an educational therapist, included communications with Student's Parents and any and all records pertaining to the provision of educational therapy to Student, and any and all records pertaining to the Academic Therapy Report of April 26, 2021, asserting the records were necessary as they related to the provisions of services to Student and issues of assessment.

The subpoenaed documents requested of Karen Swinehart included communications with Student's Parents and any and all records pertaining to the provision of educational therapy to Student, and any and all records pertaining to the provision of services for Student and any assessments conducted of Student, asserting the records were necessary as they related to the provisions of services to Student and issues of assessment.

All the documents were to be produced to the Office of Administrative Hearings for the due process hearing by uploading them into CaseLines evidence program as described in the instructions.

APPLICABLE LAW

A party to a due process hearing under the Individuals with Disabilities in Education Act has the right to present evidence and compel the attendance of witnesses in "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h); see also Ed. Code, § 56505, subd. (e).)

In special education proceedings in California, "[t]he hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and Subpoenas Duces Tecum (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party)." (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).) This requirement

mirrors that required by Code of Civil Procedure section 1985, subdivision (b), which requires:

A copy of an affidavit shall be served with a subpoena duces tecum . . ., showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

The good cause requirement is met by a factual showing of why the requested documents or things are material and relevant to the litigated issues. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.)

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecum. In ruling on such motions, Office of Administrative Hearings, referred to as OAH relies by analogy on the relevant portions of the Code of Civil Procedure. Code of Civil Procedure section 1987.1 provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders.

REASONABLE NECESSITY FOR THE RECORDS

Student argues that the subpoenas duces tecum should be quashed because they fail to make the requisite showing of reasonable necessity for the requested documents with a statement of facts showing the material and relevant information sought. Student alleges they are being sought for an improper purpose and for a

fishing expedition. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.) Student also argues that the documents are irrelevant because the reports generated by the witnesses will be produced at hearing.

Cupertino Union School District's declaration in support of the subpoena states the records were necessary as they related Student's 2019 and 2020 assessments, and the provision of services to Student.

Cupertino Union School District's declaration establishes that the documents subpoenaed are material and relevant. Cupertino Union School District is entitled to review the documents in the possession of the service providers and assessors who authored Student's reports and assessments, and made recommendations as to Student's needs and the levels of services at issue. Good cause for production of the records has been established

SCOPE OF THE SUBPOENA

Student contends that the subpoena is overly broad as the subpoena requests documents relating to communications between those identified professionals and Student's Parents. Student asserts "documents relating to communications" is a description which is overboard, ambiguous, and confusing. Cupertino Union School District asserts it is entitled to understand the objectivity of the service providers and assessors who authored Student's assessments and reports and made recommendations as to Student's needs and the levels of services at issue. Student has failed to establish that licensed practitioners would be confused the term "communications."

SUBPOENA FOR ATTENDANCE OF WITNESS(ES)

California Code of Regulations, title 5, section 3082, subdivision (c)(2), specifies the right of the parties in a special education hearing to compel the attendance of witnesses at hearing. That regulation states, "[t]he hearing officer shall have the right to issue subpoenas (order to appear and give testimony) and subpoenas duces tecum (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party)." Thus, subpoenas are available to require the production of information that is reasonably necessary in order for a party to present their case at hearing.

In the absence of regulations pertaining to the details of subpoena processes in administrative hearings, the Office of Administrative Hearings requires parties to comply with procedures described in California Civil Code. California Civil Code section 1985 governs the issuance of subpoenas. In accordance with the California Civil Code, OAH allows attorneys to issue subpoenas to witnesses to require their attendance at hearing with documents and to excuse the attendance of witnesses if documents are produced. Parties must also comply with the consumer protections of California Civil Code 1985.3 when seeking the production of the personal records of a consumer. (*Sehlmeyer v. Dept. of General Services* (1993) 17 Ca. App. 4th 1072.) A subpoena for the attendance of a witness must also meet the good cause requirement by a factual showing of why the testimony and/or production of records are material and relevant to the litigated issues. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.)

Student asserts the subpoena duces tecum which require the presence of the witnesses are brought for the purpose of harassing the witnesses. Student asserts the witnesses were already on Student's witness list. Student asserts a release of information was proved to the witnesses, and therefore the subpoenas are not

necessary. Cupertino Union School District asserts those witnesses have not responded to telephone calls from Cupertino Union School District staff. Therefore, there is no certainty that these witnesses will appear based on Student's mere request, and a subpoena duces tecum is necessary.

ORDER

1. Student's motion to quash Cupertino Union School District's subpoena to Rebecca Fineman, Amy Travers, Vibha Pathak, Maayan Glaser-Koren, and Karen Swinehart is DENIED. The records shall be produced to the Administrative Law Judge by uploading them to CASELINES by the first day of the hearing in this matter.
2. The dates for the witnesses to appear shall be modified based upon the due process hearing schedule, the stipulations reached after counsel for Student and Cupertino Union School District meet and confer, and the witness' agreed upon availability.
3. Counsel for Cupertino Union School District shall immediately serve a copy of this order on Rebecca Fineman, Amy Travers, Vibha Pathak, Maayan Glaser-Koren, and Karen Swinehart.

IT IS SO ORDERED.

Deborah Myers Cregar

Deborah Myers-Cregar

Administrative Law Judge

Office of Administrative Hearings